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IN THE
Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF BIRCH BAYH IN SUPPORT OF THE PETITIONER

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This Brief Amicus Curiae in support of Petitioner is filed by former Senator Birch Bayh.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

Birch Bayh served as United States Senator for the State of Indiana from 1963 to 1981. In that capacity, he was the author and principal Senate sponsor of the provision that ultimately was enacted as Title IX of the Higher Education Act of 1972, 20 U.S.C. § 1681 *et seq.*

Senator Bayh has had a life long commitment to the establishment and protection of civil rights and of equal rights for women. In particular, prior to the passage of Title IX, he was the principal sponsor of the Equal Rights Amendment in the Senate and led the debate for its proponents on the floor of the Senate. Since the adoption of Title IX, he has testified before both Congressional Committees and an Executive Branch Commission concerning the elimination of sex discrimination.[2]

Senator Bayh previously submitted a Brief Amicus Curiae in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), in which the Court upheld the validity of regulations promulgated by the Department of Education

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[1] Blanket consents to the submission of amicus briefs are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amicus states that this Brief was not authored or funded by any person or entity other than Amicus or his counsel.

[2] *See* "Title IX: Thirty Years Later", Hearings before the Senate Health, Education, Labor and Pension Committee, 107th Cong., 2d Sess. (June 27, 2002); "Title IX and Science", Hearings before the Subcommittee on Science, Technology and Space of the Senate Committee on Commerce, Science and Transportation, 107th Cong., 2d Sess. (Oct. 3, 2002); Hearings before the Secretary's Commission on Opportunity in Athletics, United States Department of Education (Aug. 27, 2002).

under Title IX that prohibited sex discrimination with respect to employment in federally funded education programs. The Court stated that his remarks on the floor of the Senate are an authoritative guide to the construction of Title IX. *North Haven*, 456 U.S. at 526-527.

SUMMARY OF ARGUMENT

Title IX prohibits sex discrimination in federally funded education programs, subject only to narrowly defined exceptions for educational institutions with unique missions. The court of appeals held that Title IX does not prohibit retaliatory discrimination because the term "retaliation" does not appear in the language of the statute. However, its conclusion is incorrect. Congress consciously drafted Title IX to apply to all forms of sex discrimination in education, including retaliation. Further, with respect to the specific context in which this lawsuit arises – employment – Congress included no exception to its broad prohibition against sex discrimination. As confirmed by a thorough and critical assessment of the legislative history, Congress intended that Title IX would prohibit the insidious practice of retaliation.

The sponsors of Title IX were personally familiar with historical efforts to eliminate racial discrimination and sex discrimination. During the Civil Rights Movement of the 1950s through the 1970s, Americans of all colors, creeds, religions, and sexes concluded that the time had come to put aside all forms of discrimination in our society, including racial and gender discrimination; that all necessary and reasonable steps should be taken to accomplish that goal; and that effective enforcement devices should be created to vindicate these rights.

One manifestation of the commitment to prohibit discrimination against women was the introduction in Congress of the proposed Equal Rights Amendment of the Constitution. Amicus curiae was Chairman of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, which held hearings on the proposed Amendment starting in 1970. The hearings demonstrated that women faced a large number of insidious discriminatory practices. For example, the hearings showed that women consistently were denied wages equal to those of their male co-workers. Women also were denied access to the most challenging and desirable employment opportunities. Farm women who toiled side-by-side with their husbands, or wives who were business partners with their husbands, were denied equal opportunity to inherit jointly-owned property. In some States, women were consistently sentenced to more severe penalties than men for similar crimes.

Worst of all, the hearings developed conclusive evidence that girls and women were denied equal opportunities in the nation's educational system. As a result, 52% of the nation's citizens were being denied development of their intellectual and athletic skills. They also suffered discrimination in employment, tenure, promotion and compensation in education. The hearings generated a determination in Congress to right these injustices.

The proposed Equal Rights Amendment progressed slowly through Congress and faced the prospect of a lengthy ratification process in the States. In this environment, amicus curiae and his colleagues determined that the evidence of sex discrimination in education was so compelling that problems in this specific area should be redressed as rapidly as possible, without awaiting the completion of the comprehensive effort to prohibit

discrimination in all sectors through amendment of the Constitution.

In 1972, the Senate accepted a floor amendment offered by amicus curiae and added Title IX to the Higher Education Act by voice vote. Thereafter, the House accepted the Senate amendment, and Title IX became law on June 23, 1972. In sweeping language and in the most basic terms, Title IX provided that girls and women would no longer be subjected to the multi-faceted forms of blatant discrimination that they had faced over the years in the nation's educational system.

This Court has played an indispensable role in the progress that has followed the enactment of this landmark legislation. In a series of decisions, the Court has upheld the substantive rights protected by Title IX and has recognized that Congress intended that victims of discrimination have the remedies necessary to accomplish the goal of eliminating all forms of discrimination in federally funded education programs. For example, the Court has recognized that Congress intended to create a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); that the prohibition against sex discrimination in education applied to employment, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); and that the private right of action under Title IX applies to suits for damages, *Franklin v. Gwinett County Board of Education*, 503 U.S. 60 (1992).

This case involves another critically important aspect of the struggle against sex discrimination in education. It presents the question whether the prohibition against discrimination in Title IX, and the concomitant private right of action, prohibit retaliation based on a person's having complained about a school system's discriminatory practices. Effective enforcement of the statute depends heavily upon

the willingness of educators who believe they have witnessed discrimination to be free of discrimination in turn for having had the courage to try to vindicate the right established by Congress. Further, the question arises in the context of athletic participation by young women, which is a critical aspect of their education. Continued progress toward equality for women in education and in later life depends importantly upon the effort to insure equal opportunity for young women athletes at the high school level.

The legislative history demonstrates that the Congress that adopted Title IX intended to build upon the civil rights laws that prohibited racial discrimination and extended those laws to prohibit retaliatory discrimination in education.

ARGUMENT

I. THE PLAIN LANGUAGE OF TITLE IX AUTHORIZES ACTIONS FOR SEX DISCRIMINATION BY RETALIATION.

Title IX prohibits discrimination against a person who complains about unlawful sex discrimination in a federally funded education program or activity and grants a private right of action to any person who has been the victim of such retaliation. Title IX provides, in pertinent part:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

The principal part of Title IX prohibits, in sweeping terms, all acts of discrimination on the basis of sex against any "person" by an educational institution in any education program or activity that receives federal financial assistance. Title IX then provides nine limited exceptions to this broad rule for certain specific categories of educational institutions and conduct. None of these exceptions provides an exemption for claims of sex discrimination practiced through retaliation against a person who has complained that an educational institution is engaging in discrimination.

This Court has previously recognized that Congress, in enacting Title IX, intended to prohibit a broad range of discriminatory conduct by educational institutions. The Court has found that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *North Haven*, 456 U.S. at 521, quoting *United States v. Price*, 383 U.S. 787, 801 (1966). Consistent with this approach, the Court has held that Title IX prohibits sex discrimination in forms as varied as employment decisions and practices, *North Haven*, 456 U.S. at 530; sexual harassment of a student by a teacher, *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and

sexual harassment of a student by another student, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).[3] The Court also has held that, in order to accomplish the broad statutory purposes underlying this provision, Title IX is enforceable through an implied private right of action for damages. *Franklin*, 503 U.S. at 72-73.

The breadth of the language Congress adopted in Title IX, together with the absence of a specific exemption for claims based on retaliation, strongly support the conclusion that a person is "excluded from participation in" a federally funded program and is "subjected to discrimination" on the basis of sex when that person suffers retaliation for having complained about unlawful sex discrimination in such a program. *See North Haven*, 456 U.S. at 521-522. The Court has never recognized an exception from the substantive scope of the prohibition on sex discrimination based on the form or type of action through which the discrimination was practiced. Similarly, the Court has not previously established an exception for discrimination in formal employment actions. The decision

[3] In certain contexts, the Court has recognized a limitation on the private right of action under Title IX by requiring that, before discriminatory intent may be ascribed to the funding recipient, it must have control over both the person who takes the discriminatory act and the context in which the discrimination occurs. *See Gebser*, 524 U.S. at 284-290; *Davis*, 526 U.S. at 639-647. The concerns that led the Court to adopt that requirement would not appear to be present here. This case involves a formal decision by a school system to terminate Petitioner's employment as a coach, an official action carried out by an authorized decision maker, pursuant to established procedures. Further, as demonstrated below, the act of discrimination allegedly involved here – retaliation against a person who complains of unlawful sex discrimination – is of a type with which Congress was familiar at the time it adopted Title IX.

by the court of appeals thus represents a sharp departure from this Court's prior decisions.[4]

At the time Title IX was adopted in 1972, the Court had clearly recognized that retaliation on the basis of a complaint about racial discrimination constituted a form or type of discrimination that was prohibited under the civil rights statutes and that could be challenged through an implied private right of action. In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969), the Court held that a white man could maintain an action under 42 U.S.C. § 1982 for his expulsion from a membership corporation in retaliation for his protest against the entity's refusal to approve the assignment of a lease to a black man. The Court concluded that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property" and therefore could form the basis for a private right of action under that statute. 396 U.S. at 237.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court found that in enacting Title IX, Congress had acted "against the backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX." 441 U.S. at 699 n. 22. These decisions specifically included

[4] The court of appeals erred in concluding that *Alexander v. Sandoval*, 532 U.S. 275 (2001), altered the fundamental approach for reviewing a statute to determine the scope of an implied private right of action and that, after *Sandoval*, the scope of such an implied right is defined exclusively by the language and structure of the statute. Pet. App. 19a. The scope of the implied right is of course defined by legislative intent. But it is well established that the scope of the implied right under Title IX is determined by reference to the legislative history, *North Haven*, 456 U.S. at 521-530, including importantly an evaluation of "the state of the law when the Legislature passed Title IX," *Franklin*, 503 U.S. at 71.

Sullivan, with its recognition of an implied private right of action based on retaliatory discrimination. *See id.* at 690 n.13 and 699 n. 22. *Accord Franklin*, 503 U.S. at 72.

Similarly, Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. With the substitution of the word "sex" in Title IX to replace the words "race, color, or natural origin" in Title VI, the two statutes use identical language to define the benefited class. In *Cannon*, the Court found that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."[5] 441 U.S. at 696. During that time period, an implementing regulation was adopted under Title VI that explicitly prohibited retaliation based on complaints about illegal discrimination. *See* 45 C.F.R. § 86.71 (1975), incorporating 45 C.F.R. § 80.7(e)(1975). In *Cannon*, the Court concluded that, both as a general principle and for specific reasons unique to this statute, Congress intended that Title IX would be enforced in the same manner as Title VI.

> It is always appropriate to assume that our elected representatives, like other citizens,

[5] In support of this conclusion, the Court cited three statements by Senator Bayh in floor debate over adoption of Title IX:

> "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]" 117 Cong. Rec. 30408 (1971) (Sen. Bayh). Accord, 118 Cong. Rec. 5807 (1972) (Sen. Bayh); id. at 18437 (1972) (Sen. Bayh) ("[E]nforcement of [Title IX] will draw heavily on these precedents" under the Civil Rights Act of 1964).

Cannon, 441 U.S. at 696 n. 19. *See id.* at 706 n. 40.

> know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

441 U.S. at 697-698.

Thus, there is every reason to conclude that when it enacted Title IX in 1972, Congress expected and intended that the broad language of the statute, prohibiting discrimination based on sex without limits on the "persons" protected by the statute or the form of "discrimination" involved (other than specific exceptions for defined types of educational institutions), included a ban on retaliation for complaints about sex discrimination. As the Court found in *Sullivan*, "reprisal discrimination must be actionable . . . in order to make meaningful the rights protected by the statute . . . ." 396 U.S. at 237. It correctly noted that, at times the only effective adversary of discrimination is someone who is not the direct target. *Id.*

II. THE LEGISLATIVE HISTORY OF TITLE IX CONFIRMS THAT RETALIATION IS PROHIBITED CONDUCT.

The Eleventh Circuit held that Petitioner could not maintain an action under Title IX for retaliatory discrimination on the principal ground that the text of the statute "makes no mention of retaliation at all." Pet. App. at 20a. It found that this silence "weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." *Id.* However, both the court's approach to

determining Congressional intent and its conclusion are erroneous.

As this Court held in *Cannon*, the private right of action under Title IX is implied, rather than express. Therefore, the Eleventh Circuit "fundamentally misunderst[ood] the nature of the inquiry" by attempting to attribute dispositive significance to the "silence" of the statute on this point. *See Franklin*, 503 U.S. at 72. Rather, under these circumstances the Court reviews the background against which Congress acted in order to determine the contours of the right of action that it implicitly authorized.

The context in which Congress enacted Title IX in 1972 demonstrates clearly that (a) Congress intended to prohibit all forms of discrimination in federally funded educational programs, including retaliation; (b) its intent is especially clear with respect to prohibiting all forms of discrimination in employment, the context in which this lawsuit arises; and (c) Congress intended the private right of action under Title IX to extend to such retaliation claims.

1. The 1970 Hearings. Congressional consideration of sex discrimination began in earnest in 1970, six years after successful completion of a generations-long effort to adopt legislation to end forever the pernicious practice of racial discrimination. Many of the Members of the Congress that adopted Title IX, including amicus curiae, had participated in the convulsive struggle to enact civil rights legislation and subsequent efforts to oversee the implementation of these new laws.

Title IX was modeled upon prior civil rights legislation. Congress intended that its prohibition on sex discrimination would sweep at least as broadly as the prohibition on racial discrimination and would be enforced

through the same types of remedial measures as had been developed under the civil rights statutes.

The first significant legislative effort to address sex discrimination in education were hearings held in June and July 1970 by a special Subcommittee on Education of the House Committee on Education and Labor, chaired by Representative Edith Green.[6] *North Haven*, 456 U.S. at 523 n. 13. In 1,200 pages of testimony, the Subcommittee produced substantial evidence that women suffered from "massive, persistent patterns of discrimination" in all aspects of education, including admissions, scholarship programs, faculty hiring, pay, promotions and tenure. *See* 118 Cong. Rec. 5803-5804 (1972) (remarks of Senator Bayh). In particular, the hearings demonstrated that many women had suffered from retaliation by educational institutions in response to their objections to discriminatory practices.[7]

The hearings also demonstrated that the federal civil rights statutes did not contain effective measures to prevent and redress sex discrimination. For example, they showed that Title VI of the Civil Rights Act prohibited racial discrimination by all recipients of federal funding but did not

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[6] "Discrimination Against Women," Hearings before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970).

[7] Prior briefs submitted by Petitioner and the United States have quoted passages from the testimony or statements before the Subcommittee of Dr. Ann Harris, Dr. Bernice Sandler, Daisy Fields, and the Women's Rights Commission of New York University Law School that describe how women had experienced retaliatory discrimination in employment due to their efforts to fight sex discrimination at educational institutions. Petition at 17-18; Brief for the United States as Amicus Curiae in support of the Petition at 8 n.1. *See* 118 Cong. Rec. 5810, 5812 (reprinting article by Dr. Bernice Sandler "The Status of Women: Employment and Admissions")("I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such [sex] discrimination.")

extend to sex discrimination. Section 601, 78 Stat. 241, 252, codified at 42 U.S.C. § 2000d. Further, Title VII prohibited sex discrimination in employment but did not extend to educational institutions. Section 703, 78 Stat. at 255, codified at 42 U.S.C. § 2000e-2.

2. Contemporaneous Consideration of the Equal Rights Amendment. The Congressional effort to adopt a law containing a sector-specific prohibition against sex discrimination in education overlapped with a broader legislative effort to address the general issue of gender discrimination. In May 1970, the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, chaired by Senator Bayh, held three days of hearings on the proposed Equal Rights Amendment. As with the efforts to address sex discrimination in education specifically, the proponents of the constitutional amendment cast their arguments for adoption as an extension of the recent, successful struggle to adopt legislation prohibiting racial discrimination. Representative Shirley Chisholm crystallized the issue in her Subcommittee testimony:

> I have been far oftener discriminated against because I am a woman than because I am black.

See 118 Cong. Rec. 8900 (as quoted by Senator Bayh).

The proposed Equal Rights Amendment was adopted by the House in 1970 and was debated, but not passed, by the Senate. Thus, when the Ninety-Second Congress convened in 1971, its agenda included unfinished work on several proposed responses to sex discrimination.

3. Initial Consideration of Title IX in 1971. The provision that ultimately became Title IX was first offered by

Senator Bayh on August 5, 1971, as a floor amendment to the Higher Education Act of 1971. 117 Cong. Rec. 30155. *See North Haven*, 456 U.S. at 523 n. 13. The bill reported by the Senate Committee on Labor and Public Welfare did not contain an anti-discrimination provision. *See* S. Rep. No. 92-346, 92nd Cong., 1st Sess. (1971). As the Court has previously found, because Title IX's key provisions:

> originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements –which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks – are the only authoritative indications of the congressional intent regarding the scope of § § 901 and 902.

Id. at 527.

On August 6, 1971, the Senate debated Senator Bayh's sector-specific amendment to prohibit sex discrimination in education. On the same day, he attempted to place the Equal Rights Amendment directly on the Senate Calendar for debate. *See* 117 Cong. Rec. 30213-30215 (August 6, 1971).

The Bayh Amendment proposed to prohibit recipients of federal funds from discriminating against women in education programs. Senator Bayh characterized his amendment as a "narrower embodiment of that principle [equality]" that was before the Senate in the Equal Rights Amendment. 117 Cong. Rec. at 30414.

The Bayh Amendment was intended to "insure that no American will be denied access to higher education because of race, color, religion, national origin, or sex." *Id.* at 30403.

Senator Bayh stated "that the evidence of sex discrimination is truly appalling" but that there was a gap in the civil rights laws, because "[t]he antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination" by educational institutions. *Id.* He noted that "this [the language of his amendment] is identical language specifically taken from title VI of the 1964 Civil Rights Act." *Id.* at 30407. He stated that "the same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act and the regulations thereunder would be equally applicable to discrimination [prohibited by the amendment]." *Id.* at 30408. *See Cannon*, 441 U.S. at 696 n. 19.

The Higher Education Act was considered under a unanimous consent agreement which required that all amendments must be germane to provisions in the measure as reported by Committee. The Bayh Amendment ultimately was ruled non-germane and never came to a floor vote in that Session of Congress. *Id.* at 30415. However, the debate on the Amendment paved the way for further legislative action in 1972, when Congress resumed consideration of the bill. In the interim, on October 12, 1971, the House again approved the Equal Rights Amendment.

4. Adoption of Title IX in 1972. On February 7, 1972, the Senate Committee on Labor and Public Welfare reported a new version of the Education Act. As with the 1971 version, this bill did not contain a prohibition against sex discrimination in education. *See* S. Rep. No. 92-604, 92nd Cong., 2d Sess. (1972). Senator Bayh again introduced an amendment to prohibit sex discrimination in federally funded education programs. This measure was substantially similar to the amendment that he had proposed in 1971. *North Haven*, 456 U.S. at 524.

During the floor debate, Senator Bayh stated that his Amendment "is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs." 118 Cong. Rec. at 5803 (emphasis added).

> The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions – and appropriate safeguards – parallel to those found in title VI of the 1964 Civil Rights Act.

Id. 118 Cong. Rec. 5812 (1972). His provision was explicitly intended to prevent discrimination on the basis of sex in the same manner that discrimination already was prohibited on the basis of race, religion or national origin; and to make sex discrimination subject to the same enforcement mechanisms that Congress had adopted to redress these other forms of discrimination.

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI. . . . The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Id. at 5807, quoted in *Cannon*, 441 U.S. at 696 n. 19. He further explained:

> We are dealing with discrimination in admissions to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.
>
> In the area of employment, we permit no exceptions.

Id. at 5812 (emphasis added).

The Senate adopted the Bayh Amendment by voice vote on February 28, 1972. *Id.*, at 5815. On March 22nd, the Senate adopted the Equal Rights Amendment. *Id.* at 9598. An important part of the case for adoption of the proposed Amendment was the evidence of discrimination against women in education that had been compiled in the course of consideration of Title IX. *Id.* at 8901 (remarks of Senator Bayh).

In the Conference Committee on the Higher Education Act, the House and the Senate agreed to include the anti-discrimination measure now known as Title IX.[8] The Conference measure was adopted by both Houses and signed by the President on June 23, 1972.

As adopted, Title IX contained a sector-specific prohibition on sex discrimination in federally funded

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[8] *See* S. Conf. Rep. No. 92-798, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.A.A.N. at 2671-2672.

education programs. Congress intended: (1) to extend the existing Civil Rights laws to apply generally to education, with limited exceptions that apply to specifically defined categories of institutions and conduct;[9] (2) to prohibit discrimination in employment in covered educational institutions; and (3) to have Title IX be applied and enforced in a manner parallel to Title VI of the Civil Rights Act.

5. Congressional Consideration of the Title IX Implementing Regulations. In 1975, Congress held several hearings to determine whether to disapprove the implementing regulations for Title IX adopted by the then Department of Health, Education and Welfare. On several occasions, the Court has relied upon the unique post-enactment history of the statute to confirm its understanding of Congressional intent concerning the scope and purpose of Title IX. *See e.g., North Haven*, 456 U.S. at 535. This legislative history provides further support for the proposition that in adopting an implementing regulation that prohibited retaliatory discrimination for complaints about sex discrimination, HEW correctly ascertained the legislative intent. *See North Haven*, 456 U.S. at 535; *Cannon*, 441 U.S. at 687.

The implementing rules incorporated a provision of the existing Title VI regulations that prohibited retaliation in

[9] As originally adopted, Title IX contained five exceptions that applied to specific categories of educational institutions with unique missions. These exceptions applied to admissions to certain types of educational institutions (Section 901(a)(1)-(2) and (5)); and categorical exemptions for certain types of educational institutions controlled by religious organizations and that train individuals for military service (Section 901(a)(3)-(4)). These provisions contained no exceptions for discrimination in employment in covered institutions. Further, the amendments to Section 901(a) adopted since 1972 have not provided an exception that would exempt discrimination in employment.

federally funded programs. 45 C.F.R. § 86.71 (1975), incorporating 45 C.F.R. § 80.7(e)(1975).[10] It provided:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

45 C.F.R. § 86.71. Senator Bayh testified on the implementing regulations before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor. He stated that Congress, in enacting Title IX, had intended that its enforcement mechanisms would be modeled on those of Title VI.[11]

After extensive review, Congress did not prevent the Title IX implementing regulations from taking effect. While not dispositive, this history provides further support for the conclusion that in prohibiting retaliation in employment against a person who has complained about sex discrimination in a federally funded education program, HEW had properly implemented the intent of Congress.

[10] The current counterparts of these rules are 34 C.F.R. § 106.71 (Title VI) and 34 C.F.R. § 100.7(e) (Title IX).

[11] "Sex Discrimination Regulations", Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided by Title VI"); *see id.* at 174, 183.

6. Conclusions Concerning the Intent of Congress. The legislative history of Title IX confirms the conclusion that emerges from a review of the text of the statute: that Congress intended Title IX to sweep broadly to preclude sex discrimination in education, including in employment decisions; and that the scope of that prohibition includes discrimination in employment through retaliation. Congress intended that Title IX would be enforced through remedies similar to those that had been developed in the implementation of the civil rights statutes, which included a prohibition on retaliation. Nothing in the legislative history suggests that Congress intended to exempt from coverage one type of sex discrimination – retaliation – especially retaliation in employment, the context in which this lawsuit arises.

The Court properly concluded in *Cannon* that Congress adopted Title IX in 1972 with the intention that the private right of action under this provision would have at least the same scope as the enforcement action under the civil rights statutes, which already had been held in *Sullivan* to encompass a claim based on discrimination through retaliation.

III. THE PROHIBITION OF DISCRIMINATION THROUGH RETALIATION IS NECESSARY TO INSURE EFFECTIVE ENFORCEMENT OF TITLE IX.

In the thirty years since the adoption of Title IX, there has been a remarkable evolution of increased participation and expectations for girls and women in the classrooms and on the playing fields of America's high schools, colleges, and universities. Old stereotypes have crumbled, often begrudgingly. Today the benefits of Title IX can be observed in subsequent generations of female

faculty members, school administrators, doctors, lawyers, business and corporate leaders.

Title IX has had the most profound impact on the lives of women in academia. Prior to 1972, women students and faculty were routinely barred from study in certain disciplines otherwise open to men. Other disciplines imposed quotas upon women. Some institutions of higher learning were simply closed to female students and faculty. Since the passage of Title IX, progress in the academic area has been steady, quiet and profound. Today more than 53% of college and university students are women. The representation of women on faculties has increased from 18% to 37%.

However, much remains to be done. Women graduates and faculty remain concentrated in what are typically regarded as "female fields" with lower incomes, such as teaching and nursing. Female students and faculty are significantly underrepresented in certain sciences, engineering, and high-tech disciplines.[12] Tenure tracks for faculty continue to be weighted in favor of men, and women have fewer opportunities in administrative positions on our campuses.

Since the enactment of Title IX, women athletes have made stunning progress in our schools, colleges and universities. In the ensuing 30 years, the percentage of women participating in school athletic programs has risen from 10% to 41%. The number of women participating in college athletics has risen from 32,000 to 160,000. In the sector involved in this lawsuit, the number of high school

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[12] "Title IX at 30: Report Card on Gender Equity," Report of the National Coalition for Women and Girls in Education at 11-12 (June 2002) ("Report Card"), available at www.ncwge.org/title9at30-6-11.pdf.

girls participating in sports has risen from 300,000 to 2.78 million, an eight-fold increase.[13] The dramatic increase of girls in high school athletics will in turn enable further growth in college-level participation. Our daughters, like our sons, will expect the opportunity to participate on our college and university athletic teams. There will be no lack of interest.

As a result of this dramatic increase in participation in sports at educational institutions, girls and young women now enjoy, along with their male peers, the attendant benefits of better health, self-esteem, academic performance, and development of leadership skills. Since girls have been allowed to participate equitably in academics and sports, they have experienced a decrease in drug use, smoking, teen pregnancy and drop-out rates.[14] In addition, the opportunity to participate in athletics has had a profound impact on the ability of young women to succeed after they have graduated. It is no accident that in a recent poll of female CEOs, 80% stressed the importance of their participation in athletics.[15]

As never before, Title IX has made it possible for girls and women to receive and compete for critical scholarship dollars, as their male peers have always enjoyed. Today, college women are headlining our sports pages and television, as in the women's NCAA basketball championship. Most importantly, through sports participation many young women now are able to obtain a college education, which previously was out of their reach. Thanks to the progress Title IX has produced in college athletics, women have made great strides in professional sports. Women

[13] Report Card at 14-16.
[14] Report Card at 14.
[15] *See* "From the Locker Room to the Board Room: A Survey on Sports in the Lives of Women Business Executives", available at www.massmutual.com/mmfg/about/gameface/boardroom.html

athletes have established the Women's National Basketball Association, the Women's United Soccer Association, and participate on teams within the United States Soccer Federation. American women have won the World Cup in soccer and unprecedented numbers of Olympic medals.

Despite this progress, women athletes still lag behind their male counterparts. For example, the statistics for NCAA Division I schools are as follows:

- 53% of the student population are women
- 41% of the athletes are women
- 32% of recruiting dollars are spent on female athletes
- 36% of overall athletic budgets are utilized for women's programs
- Schools spend $2 on men's sports for every $1 they spend on women's sports.[16]

In sum, more needs to be done to achieve the mandate of Title IX for non-discrimination in athletics. The principle of non-discrimination requires a more equitable allocation of resources than is now occurring. This inequality of resources is precisely the concern expressed by the Petitioner for which he allegedly was terminated as a coach.

There is a direct relationship between the prohibition against sex discrimination in education prescribed by Title IX and the enforcement issue presented by this lawsuit.

[16] *See* Report Card at 16.

Continued progress toward equality in athletic participation at the collegiate level depends upon a concerted effort to insure equal opportunity for young women athletes at the high school level.

School administrators, teachers, athletic directors and coaches are key components in the implementation of Title IX. There are insufficient regulators to detect and remedy discrimination in every high school in the country. Compliance requires a good faith effort on the part of all federally funded institutions and their adult leadership. When local school officials refuse to comply with Title IX, it is important that a high school coach like the Petitioner be able to complain within the school system about a possible discriminatory act and not suffer retaliation for having had the courage to object.

In a practical sense, the Petitioner in this case is a "private attorney general." A decision upholding his right to be free of discrimination in employment for trying to vindicate the right established by Congress will send a strong message to other persons throughout the country who believe that they have witnessed discrimination in education programs and to the school systems that employ them.

The Congress that adopted Title IX was determined to eradicate discrimination on the basis of sex in federally funded educational programs. Congress chose not to set forth a panoply of specific prohibitions and remedies that could be utilized in their enforcement, because it would have been impossible to anticipate every conceivable situation in which the statute might apply. Rather, Congress chose to adopt sweeping language that prohibited all forms of discrimination, with narrow, specific exceptions. Congress adopted this approach to convey its intention in the most direct terms possible, by incorporating the prohibition

against sex discrimination within the overall framework and enforcement mechanisms established under the civil rights statutes. Title IX was patterned after Title VI of the Civil Rights Act of 1964, with the intent that federal courts would apply the same broad enforcement mechanisms for Title IX that had already been recognized and applied under the statute that prohibited racial discrimination. *See Cannon*, 441 U.S. at 699; *Sullivan*, 396 U.S. at 237. Retaliatory discrimination in education was abhorrent to those who enacted Title IX.

Accordingly, the Court should reverse the lower court's decision and hold that the Title IX prohibits discrimination through retaliation.

CONCLUSION

For the reasons set forth above, Amicus curiae respectfully submits that the judgment below should be reversed.

Respectfully submitted,

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